

1 **IN THE UNITED STATES DISTRICT COURT**
2 **FOR THE DISTRICT OF PUERTO RICO**

3 MUNICIPALITY OF CAGUAS

4 Plaintiff

5 v.

Civil No. 08-2048(SEC)

6 TELECOMMUNICATIONS
7 REGULATORY BOARD OF PR

8 Defendants

9 **OPINION & ORDER**

10 Pending before this Court is Defendant Telecommunications Regulatory Board of Puerto
11 Rico's ("the Board") motion to dismiss (Docket # 8), and Plaintiff, the Municipality of Caguas'
12 ("the Municipality") Opposition thereto (Docket # 14). The Board has also filed a reply to the
13 Opposition. Docket # 17. After reviewing the filings, and the applicable law, the motion to
14 dismiss is **GRANTED**.

15 **Factual and Procedural Background**

16 The following factual summary has been gleaned from the Complaint. Docket # 1. The
17 case revolves around the Municipality's rights to collect compensation from
18 telecommunications and TV providers for the use and maintenance of municipal rights-of-way
19 under the Federal Telecommunications Act of 1996, 47 U.S.C. § 251 et. seq. ("FTA") and the
20 Cable Communications Policy Act of 1984, 47 U.S.C. §. 521, et seq. The pertinent language
21 regarding this right is § 253(c) of the FTA, which grants the authority to a "... State or local
22 government to manage the public rights-of-way or to require fair and reasonable compensation
23 from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for
24 use of public rights-of-way ..." 27 U.S.C. § 253(c).

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3 Created in 1996, the Board is the Commonwealth's local franchising authority. It is thus
4 responsible for assessing fees on cable and telecommunications companies in accordance with
5 the Cable Act. 27 P.R. Laws Ann. § 269h; see Liberty Cablevision of Puerto Rico, Inc. v.
6 Municipality of Caguas, 417 F.3d 216, 218 (1st Cir. 2005). The Puerto Rico Legislature made
7 "... the Board as its sole franchising authority, 27 P.R. Laws Ann. § 269h, and gave it broad
8 powers, 27 P.R. Laws Ann. § 267i, including the power to grant franchises and to assess
9 franchise fees for use of the rights-of-way, 27 P.R. Laws Ann. § 267j(h)." Id. at 222. After
10 several municipal initiatives to charge cable TV providers for rights-of-way, the Commonwealth
11 Legislative Assembly attempted to enact legislation that would provide a legal framework for
12 municipalities to receive fees for the use of publically owned rights-of-way.

13 Plaintiffs point out that in 2004, the Puerto Rico Legislative Assembly, through Act 258,
14 amended the Puerto Rico Autonomous Municipalities Act, 21 P.R. Laws Ann. § 4001 et seq.,
15 to enable municipalities to assess fees for use of the public rights-of-way. Under said
16 amendment the Board was charged with promulgating the necessary regulation. Id. at § 4052.
17 Plaintiffs allege that Act 258 mandated that this be done within ninety (days) of enactment, but
18 that the Board took over three (3) years to approve the "Reglamento para el Cobro de Derechos
19 por el Uso y Mantenimiento de las Servidumbres Municipales por las Compañías de
20 Telecomunicaciones y Televisión por Cable" ("the Regulation"). They further allege that at the
21 insistence of various municipalities, the Board created a multi-sectorial Technical Committee
22 to "... ensure that the municipalities would be justly compensated for the use and maintenance
23 of their property, but also that the requirements set forth in the applicable law and its
24 interpretive jurisprudence were fully observed." Docket # 1.

25 The Municipality avers that one of the key recommendations made by the Technical
26 Committee involved the Utilization Charge for the rights-of-way. This was submitted to the

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3 Board in 2007, but the proposed Regulation then allegedly substantially deviated from the
4 Technical Committee's recommendations. On August 15, 2007, several municipalities
5 submitted written objections to the Regulations, and asserted that it was illegal as drafted. They
6 then filed a *mandamus* in local court, which was settled after the Board agreed to review the
7 comments submitted by interested parties, including the Municipality.

8 Despite the settlement, the Municipality asserts that the final Regulation approved on
9 July 18, 2008, violates its rights by: 1) imposing a Utilization Charge formula that does not
10 reflect the actual value of the property being utilized by service providers in violation of §
11 253(c), 2) not including a "use and maintenance" surcharge in violation of Act 258, and 3)
12 charging a franchise fee of 3% over gross revenue, which due to the 5% franchise fee
13 authorized by the Cable Act, would translate in to Utilization Charges of no more than 2% of
14 gross revenues, regardless of the use of the Municipality's property. Accordingly, the
15 Municipality argues that the Board, Puerto Rico's local franchising authority, allows cable TV
16 providers to construct systems on municipal property, without reasonable compensation. It
17 further avers that the delay in the final approval of the Regulation constituted an unjustified
18 delay, and millions of dollars in lost revenues for Puerto Rico's municipalities.

19 In sum, the Municipality alleges that the Regulation:

20 (i) will not provide municipalities with "fair and reasonable compensation" as set
21 forth in Section 253(c) of the FTA; (ii) improperly limits the Utilization Charge
22 that maybe be levied upon cable TV providers; (iii) deprives the municipalities of
23 jurisdiction to address and/or adjudicate disputes related to the various charges
24 imposed under the Regulation; and (iv) fails to address the undue and unjustified
25 delay on the part of the Board in approving the Regulation, which has cost the
26 municipalities millions of dollars in lost revenues.

27 Docket # 1. In light of the above, the Municipality requests declaratory judgment, pursuant to
28 the Federal Declaratory Judgment Act of 1934, 23 U.S.C. § 2201 et seq, finding the Regulation
29 illegal.

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3 **Standard of Review**

4 *Fed. R. Civ. P. 12(b)(6)*

5 To survive a Rule 12(b)(6) motion, Plaintiffs' "well-pleaded facts must possess enough
6 heft to show that [they are] entitled to relief." Clark v. Boscher, 514 F. 3d 107, 112 (1st Cir.
7 2008).¹ In evaluating whether Plaintiffs are entitled to relief, the court must accept as true all
8 of their "well-pleaded facts [and indulge] all reasonable inferences therefrom" in the plaintiff's
9 favor. Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1964 (2007). The First Circuit has held
10 that "dismissal for failure to state a claim is appropriate if the complaint fails to set forth factual
11 allegations, either direct or inferential, respecting each material element necessary to sustain
12 recovery under some actionable legal theory." Gagliardi v. Sullivan, 513 F. 3d 301, 305(1st Cir.
13 2008). Courts "may augment the facts in the complaint by reference to documents annexed to
14 the complaint or fairly incorporated into it, and matters susceptible to judicial notice." Id. at
15 305-306. However, in judging the sufficiency of a complaint, courts must "differentiate between
16 well-pleaded facts, on the one hand, and 'bald assertions, unsupportable conclusions,
17 periphrastic circumlocution, and the like,' on the other hand; the former must be credited, but
18 the latter can safely be ignored." LaChapelle v. Berkshire Life Ins., 142 F.3d 507, 508 (quoting
19 Aulson v. Blanchard, 83 F.3d 1, 3 (1st Cir.1996)); Buck v. American Airlines, Inc., 476 F. 3d
20 29, 33 (1st Cir. 2007); see also Rogan v. Menino, 175 F.3d 75, 77 (1st Cir. 1999). Thus Plaintiffs
21 must rely in more than unsupported conclusions or interpretations of law, as these will be
22 rejected. Berner v. Delahanty, 129 F.3d 20, 25 (1st Cir. 1997) (citing Gooley v. Mobil Oil Corp.,
23 851 F.2d 513, 515 (1st Cir. 1988)).

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25 ¹ FED. R. CIV. P. 8(a)(2) requires only "a short and plain statement of the claim showing that the
26 pleader is entitled to relief," in order to allow the defendant fair notice of what the claim is and the
grounds upon which it rests. Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1964 (2007).

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3 Therefore, “even under the liberal pleading standards of Federal Rule of Civil Procedure
4 8, the Supreme Court has recently held that to survive a motion to dismiss, a complaint must
5 allege ‘a plausible entitlement to relief.’” Rodríguez-Ortíz v. Margo Caribe, Inc., 490 F.3d 92
6 (1st Cir. 2007) (citing Twombly, 127 S. Ct. at 1965). Although complaints do not need detailed
7 factual allegations, the “plausibility standard is not akin to a ‘probability requirement,’ but it asks
8 for more than a sheer possibility that a defendant has acted unlawfully.” Twombly, 127 S. Ct.
9 At 1965; see also Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). Furthermore, the Court “may
10 augment the facts in the complaint by reference to documents annexed to the complaint or fairly
11 incorporated into it, and matters susceptible to judicial notice.” Gagliardi v. Sullivan, 513 F. 3d
12 301, 305-06 (1st Cir. 2008).

13 **Applicable Law & Analysis**

14 *Municipal Right to Compensation Under § 253(c)*

15 The Municipality’s basic argument is that the Regulation as approved by the Board
16 violates § 253(c) of the FTA, which refers to the authority of State or local governments “. . .
17 to manage the public rights-of-way or to require fair and reasonable compensation from
18 telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use
19 of public rights-of-way . . .” In assessing this claim, it is important to note that in most United
20 States jurisdictions, municipalities are both the franchisers and owners of cable and
21 telecommunications rights-of-way. Liberty Cablevision of Puerto Rico, Inc. v. Municipality of
22 Caguas, 417 F.3d 216, 221 (1st Cir. 2005). However, in the case of Puerto Rico, “the legislature
23 chose to designate a state agency-[the Board]-as its ‘franchising authority,’ 27 P.R. Laws Ann.
24 § 265 et seq., as opposed to granting that power to its various municipalities like most United
25 States jurisdictions.” Id.

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3 On this point of law, the First Circuit unequivocally stated: “[i]t is well established that
4 municipalities possess no inherent powers, as all such powers are derived from the state.” Id.
5 at 222. Accordingly, Municipalities do not have proprietary rights before the state. Id.
6 Furthermore, a “. . . Municipal Assembly has no authority to intervene when the Legislative
7 Assembly has preempted that particular field.” Id. (citing Lopez v. Commonwealth of Puerto
8 Rico, 21 P.R. Offic. Trans. 71, 84 (P.R.1988)). In light of this clear language, the Municipality’s
9 right to compensation is determined by the Board through the Regulation, because “. . . the
10 ‘franchising authority’ as the grantor of franchises and assessor of ‘franchise fees,’[. . .], in
11 exchange for which the franchisee cable operator may use the public ‘rights-of-way’ . . .”
12 Liberty Cablevision, 417 F.3d at 221; see also 27 P.R. Laws Ann. § 267j(h). Therefore, even
13 if Act 268 enables municipalities to assess fees for the use of rights-of-way, their ability to do
14 so is undoubtedly restricted by Commonwealth legislation and the Board. Act 268 did not create
15 a municipal franchising structure, rather a mechanism for the Board to allocate some
16 compensation to the municipalities.

17 As such, this Court finds that in the context of Puerto Rico, § 253(c)’s language is
18 directed at said state-wide entity, the Board, and not the local municipalities. Local
19 municipalities are able to exercise power of a municipal nature, but it “must be in harmony with
20 [state] government law which shall prevail in conflicting situations.” Id. (citing Lopez, 21 P.R.
21 Offic. Trans. at 84 (citations omitted)). Therefore, if the Commonwealth has set up a state-wide
22 structure regulated by the Board, the individual municipalities are bound by its decisions.

23 This Court has previously held that:

24 [t]he better approach to resolution of regulatory conflicts between
25 municipalities and telecommunications service providers lies in the joint and
uniform resolution of such questions of law . . . relief [should originate] from the
agency specifically created by Law 213 to regulate telecommunications service

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3 in Puerto Rico, the Puerto Rico Telecommunications Regulatory Board. 27
4 L.P.R.A. § 267.

5 Puerto Rico Telephone Co., Inc. V. Municipality of Guayanilla, 354 F.Supp.2d 107, 115 (D.P.R.
6 2005). At bar is an issue of state law, because in Puerto Rico the local franchising authority is
7 a state-wide body, the Board, not controlled by the municipalities. In such a context, this Court
8 does not find that § 253(c) provides a private cause of action to the Municipality to recur against
9 the Board because of its differences regarding fee assessment. If that cause of action did exist
10 it would exist under local law. Because of said finding, this Court does not have jurisdiction
11 over the present suit, and it need not address the Municipality's other claims, such as the delay
12 in creating the Regulation, and the Utilization Charge.

13 *Takings*

14 Finally, the Municipality also avers that it should be able to bring a federal takings claim
15 against the Board. It argues that the Regulation equates to a permanent physical invasion of
16 municipal property. Nevertheless, a ruling on this issue is not necessary at present. Even if the
17 Municipality had a right to such an action, it is most certainly not ripe, as ". . . Plaintiff must
18 pursue the Commonwealth's inverse condemnation remedy 'before [it] can maintain a federal
19 damages claim, since, when fleshed out by the local court, that remedy could well provide the
20 'certain and adequate relief' it seeks.' Liberty Cablevision of Puerto Rico v. Municipality of
21 Barceloneta, 326 F.Supp.2d 236, 242 (D.P.R. 2004)(rev'd on other grounds)(citing Culebras
22 Enterprises Corp. v. Rivera Rios, 813 F.2d 506, 513 (1st Cir. 1987)). Plaintiffs have not pursued
23 such a claim, nor have they attempted to prove the inadequacy of Commonwealth remedies. Id.
24 Therefore, the takings issue in this case is not ripe.

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4 **Conclusion**

5 In light of the above, the Motion to Dismiss is **GRANTED**. The Municipality's claim
6 for declaratory judgment is **DISMISSED WITH PREJUDICE**, and the takings claim is
7 **DISMISSED WITHOUT PREJUDICE**.

8 **IT IS SO ORDERED.**

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10 In San Juan, Puerto Rico, this 28th day of March, 2010.
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10 *S/ Salvador E. Casellas*
11 SALVADOR E. CASELLAS
12 United States District Judge
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